FILE COPY

Office - Supreme Court, U.S.
SEP 14 1942
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of The United States

OCTOBER TERM, 1942

No. 830.

IRENE BRADY, Administratrix of the Estate of EARLE A. BRADY, Deceased,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent

BRIEF IN REPLY TO RESPONDENT'S BRIEF

JULIUS C. SMITH,
Greensboro, North Carolina,
Counsel For Petitioner.

C. CLIFFORD FRAZIER,
D. E. HUDGINS,
WELCH JORDAN,
Of Counsel

INDEX TO BRIEF IN REPLY TO RESPONDENT'S BRIEF

SUBJECT INDEX

PART I. Respondent's Objections to Certiorari Jurisdiction are Untenable 1

PART II. Respondent's Statement of Facts is Misleading 3

PART III. Respondent's Argument is Unsupported by the Evidence and the Decisions of this Court.. 6

TABLE OF CASES CITED

Britt v. Carolina Northern R. Co., 148 N.C. 37, 61 S.E. 601 6

Clark v. Pennsylvania, 128 U.S. 395, 32 L. ed. 487, 9 S. Ct. 113 1

Davis v. Packard, 7 Pet. 276, 8 L. ed. 684 1

Hormel v. Helvering, 312 U.S. 552, 85 L. ed. 1037, 61 S. Ct. 719 2

Lilly v. Grand Trunk Western R. Co., ...U.S....., 87 L. ed. (Advance Opinions) 323, 63 S. Ct. 347 2, 3

McGraw v. Southern R. Co., 206 N.C. 873, 175 S.E. 286; 209 N.C. 432, 184 S.E. 31, *cert. den.* 299 U.S. 591, 81 L. ed. 435, 57 S. Ct. 117 6

Storm v. United States, 94 U.S. 76, 24 L. ed. 42 1

Tiller v. Atlantic Coast Line R. Co., ...U.S....., 87 L. ed. (Advance Opinions) 446, 63 S. Ct. 444 .....2, 3, 6, 7

STATUTES CITED

Federal Employers' Liability Act, 45 USCA Sec. 51 et seq 3, 7

Federal Employers' Liability Act, Amendment of August 11, 1939, 53 Stat. 1404, c. 685, 45 USCA Sec. 54 ..... 1, 2

IN THE

Supreme Court of The United States

OCTOBER TERM, 1942

No. 830

IRENE BRADY, ADMINISTRATRIX OF THE ESTATE OF EARLE A. BRADY, DECEASED,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF IN REPLY TO RESPONDENT'S BRIEF

I. RESPONDENT'S OBJECTIONS TO CERTIORARI JURISDICTION ARE UNTENABLE.

(1.) The respondent's contention that this Court has no certiorari jurisdiction of the question which petitioner raises under the 1939 Amendment to the Federal Employers' Liability Act, 53 Stat. 1404, c. 685, 45 USCA Sec. 54, is unsound for the following reasons:

(a.) Since petitioner seeks the writ only for the purpose of obtaining a review of the decision of the Supreme Court of the State of North Carolina, the respondent may not raise, and attempt to rely upon, occurrences in the progress of the trial in the trial court which were not presented, either directly or indirectly, by the record in the appellate court below. *Davis v. Packard*, 7 Pet. 276, 8 L. ed. 684; *Storm v. United States*, 94 U.S. 76, 24 L. ed. 42; *Clark v. Pennsylvania*, 128 U.S. 395, 32 L ed. 487, 9 S. Ct. 113. This record is all that is before this Court and it wholly fails to reveal any waiver of the petitioner's right to contend that the 1939 Amendment protects her against the application of the doctrine of assumption of risk, employed by the appellate court below to sustain its decision against petitioner. The record here is silent as to petitioner's position in the trial court.

(b.) It cannot be said that petitioner waived her rights under the 1939 Amendment by failing to contest the submission to the jury of an issue on assumption of risk, because the jury answered the issue in favor of petitioner upon her contention that the evidence would not justify a finding that her intestate assumed the risk of injury and death.

(c.) Manifestly, the petitioner was not required to jeopardize her case in the trial court by objecting to an issue dependent upon the applicability of a Federal statute when the point had not been decided by this Court, if she were willing to run the risk of an adverse answer by the jury. Petitioner, having taken this chance successfully, is not estopped now to assert her rights under the Amendment when the appellate court below holds for the *first time* in the history of this litigation that *as a matter of law* petitioner's intestate must "be conclusively deemed to have assumed the risk of an injury . . ." (R. Supplement 9).

(d.) The retroactivity of the 1939 Amendment was not drawn in issue until the North Carolina Supreme Court based its decision upon the doctrine of assumption of risk—the question became germane only when the appellate court below held the 1939 Amendment to be inapplicable in this case; it is now raised for the first time, and unquestionably this Court has authority to consider this vital matter. *Hormel v. Helvering*, 312 U.S. 552, 85 L. ed. 1037, 61 S. Ct. 719. The question is obviously one of first importance and the decision of the court below upon this essential phase of the case is contrary to the principles announced in the two most recent decisions of this Court. *Tiller v. Atlantic Coast Line R. Co.* ..... U.S. ....., 87 L. ed. (Advance Opinions) 446, 63 S. Ct. 444; *Lilly v. Grand Trunk Western R. Co.*, ... U.S. ....., 87 L. ed. (Advance Opinions) 323, 63 S. Ct. 347.

(e.) In any event the petitioner could not waive her present contention that the 1939 Amendment is retrospective, because this is a substantive right conferred by a public

policy statute. *Tiller v. Atlantic Coast Line R. Co., supra.* The interest of the public at large precludes the waiver of this important question which was specifically reserved in the *Lilly case, supra.*

(2.) It is significant to observe that the respondent in its brief (p. 5) admits that this Court possesses jurisdiction to hear this case upon the substantive issues of whether the court below erred in holding that petitioner could not recover (a) because there was no evidence of negligence on the part of respondent, and (b) because the evidence conclusively showed that her intestate died as a result of his own negligence which amounted to his conclusive assumption of the risk. But the respondent dismisses this right of the petitioner with the categorical statement that no special or important questions are presented. The petitioner respectfully submits that the court below committed manifest and palpable error in this case in its misinterpretation of the vital general principles of law arising under the Federal Employers' Liability Act. The decision of the North Carolina court collides head on with the liberal rule adopted by this Court in the *Tiller case, supra,* where it is said:

> "*No case is to be withheld from a jury on any theory of assumption of risk* and questions of negligence should under proper charge from the court be submitted to the jury for their determination." (Italics supplied.)

II. RESPONDENT'S STATEMENT OF FACTS IS MISLEADING.

The petitioner does not suggest that respondent has intentionally misstated any portion of the facts or that it has drawn unfair or unwarranted inferences. However, the respondent has followed the court below in stating as ultimate facts certain inferences of fact which may or may not be drawn from the evidence—inferences which only the jury were competent to make. We point out below the more important and glaring imperfections which appear in the re-

spondent's version of the facts as set out in its brief (pp. 6-16, inclusive):

(a.) The only evidence relating to Brady's familiarity with the tracks and switches at Hurt, Virginia, was that "he had frequently made previous runs as brakeman to Monroe, Virginia, on both freight and passenger trains" (R. 18) from Spencer, North Carolina, and return; that he worked for respondent only occasionally during 1938 (R. 95); and that Hurt, Virginia, lies between the two places. From this evidence the petitioner contended, and the jury apparently found, that Brady did not possess knowledge of the track conditions which would render his conduct negligent. It is beyond the province of the respondent, as it was beyond that of the court below, to undertake to supplant the inference of the jury.

(b.) Respondent says "that there has been no change . . . of the . . . derailer . . . since the accident" (p. 10 of its brief), yet the evidence was that a light was placed on the derailer after petitioner's intestate was killed (R. 25, 28-29).

(c.) The respondent's brief (p. 16) unequivocally states that "there was no evidence that any of the rails . . . or the roadbed were in any way deficient, defective . . . no evidence that the running of a car over the so-called 'wrong end' of the derailer was either normal or foreseeable." Yet the record contains the testimony of several witnesses who described the worn and defective condition of the west rail (R. 16, 30, 34) and that the roadbed was in poor condition (R. 31). Respondent's own executive official testified that he had seen perhaps as many as fifty instances of cars backed over the "wrong end" of derailers (R. 65). Again the respondent has fallen into the same error as the court below—drawn an inference which was properly left to the jury upon conflicting evidence. Unquestionably, therefore, where switching operations were in progress in the dark it was for the jury—and not the respondent or the court below—to determine whether respondent should have foreseen that the defective condition of the tracks might have caused the derailment.

(d.) The respondent says in its brief that "the inevitable conclusion is that Brady put the derailer on the rail when the train came out of the storage track" (pp. 14, 15), but the testimony of the witnesses was that Brady was on the fourth car from the engine, over thirty cars from the caboose, when the train pulled out of the storage track. The engineer said "He (Brady) set the derailer not to derail and opened the switch for me to come out and I came on out. Then I pulled out and backed down south on the northbound track beyond the crossing. *Mr. Brady was on the four cars and I saw him get off these four cars.* He rode back north on these four cars" (R. 25). The conductor testified: "I rode the caboose car back. When they came on down I stayed on the caboose car and Mr. Brady stayed where the four or five cars were. He cut those out." (R. 75). Yet in respondent's brief it is asserted that the conductor was at a highway crossing an eighth of a mile away and "remained there until the train came out of the storage track and backed down the main track again on its third movement" (p. 13). A careful scrutiny of the conductor's testimony again indicates that more than one inference can reasonably be drawn concerning his conduct. The jury *could* have made the inference which the respondent and the court below drew, but the jury exercised its privilege of reaching the equally as logical conclusion that Brady could not have reset the derailer because he was in no position to do so, while the conductor did set it because he was at the rear of the train when the switch was closed to permit the train to back up south on the main line before the four cars were cut off.

There are numerous other instances in respondent's brief where one of two conflicting inferences have been stated as ultimate facts, and petitioner has called to the attention of this Court only a few flagrant examples. The petitioner respectfully submits that the vice in respondent's references to the facts of this case is the same erroneous approach to the evidence which caused the court below to make a decision inconsistent with the principles cited in the petitioner's brief

in support of her petition for a writ of certiorari. The divergent evidence was properly submitted to the jury in the trial court and its verdict should not have been disturbed.

III. RESPONDENT'S ARGUMENT IS UNSUPPORTED BY THE EVIDENCE AND THE DECISIONS OF THIS COURT.

The petitioner again invites the attention of this Court to the discussion of the evidence contained in both the preceding part of this brief and in the petition for a writ of certiorari and supporting brief already filed with the Court.

In respondent's brief it repeats the assault which it made in the court below upon the testimony of Heritage and Holden, two of petitioner's witnesses. It is submitted that when the evidence adduced from these witnesses is considered in its entirety (R. 34-53) it was properly admitted by the trial court. The witnesses were qualified as experts and in response to adequately framed hypothetical questions expressed opinions as to the causes of the derailment. The testimony of these witnesses was undoubtedly admissible under the North Carolina cases, and no more constituted speculation and conjecture than did the evidence of the witnesses in *McGraw v. Southern R. Co.*, 206 N.C. 873, 175 S.E. 286; 209 N.C. 432, 184 S.E. 31, *cert. den.* 299 U.S. 591, 81 L. ed. 435, 57 S. Ct. 117. Such testimony is valuable probative evidence. *Britt v. Carolina Northern R. Co.*, 148 N.C. 37, 61 S.E. 601.

The court below held that the respondent owed no duty to petitioner's intestate (R. Supplement 7-8), and hence was not negligent in failing to foresee that a derailment might occur which would kill its employee. This cannot be reconciled with the rationale of this Court's decision in *Tiller v. Atlantic Coast Line R. Co., supra.*

Necessary limitations upon the scope of this reply brief preclude a detailed response to the several other arguments advanced by respondent in its brief. Some of these arguments

are met by the petition for the writ and supporting brief, but all of the respondent's points lose their effectiveness when confronted by the sound and liberal principles enunciated in this Court's decision in the *Tiller case, supra.* In the final analysis the petitioner contends that upon conflicting evidence, ample to sustain the jury's verdict in favor of petitioner, the case was properly submitted to the jury and they reached a result supported by inferences which could reasonably be deduced from the evidence. Upon appeal the court below upset the jury's verdict and in support of its decision undertook to redraw a different (and perhaps just as reasonable) set of inferences. This action of the Supreme Court of the State of North Carolina prevented petitioner from having the compensation assured her by the Federal Employers' Liability Act. It is submitted that this Court should review this case and rectify the mistake made by the court below in holding that there was no evidence of respondent's negligence and that petitioner's intestate conclusively assumed the risk of being killed.

Respectfully submitted,

JULIUS C. SMITH,
Greensboro, North Carolina,
Counsed for Petitioner.

C. CLIFFORD FRAZIER,
D. E. HUDGINS,
WELCH JORDAN,
Of Counsel.